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In the Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS, ET AL., PETITIONERS

v.

JEROME CROWLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENT

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Respondents contend that this case is partially moot because Local No. 82 stipulated in district court that it would void the ballots of the 1980 election and conduct a new election (Resp. Br. 20-27). They also argue that the occurrence of the local's regularly scheduled 1983 election moots this case entirely (*id.* at 28-34). Finally, they suggest for a number of reasons that a district court may enjoin the counting of ballots and order a new union officer election under court supervision in order to remedy violations of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411 *et seq.*) oc-

curring at a nominations meeting. These contentions are without merit.

1. Respondents' first claim is that, as a result of stipulations made by the defendants ("the union") in the district court, this case no longer "concern[s] [(a)] the propriety of the District Court's having enjoined an election from proceeding and/or [(b)] ordered an election to be rerun. * * * And it does not concern [(c)] the Court's having named third parties * * * to supervise the conduct of an election" (Resp. Br. 15). This claim is frivolous.

As to the first of those issues—the district court's temporary restraining order enjoining the counting of ballots in the 1980 election (see Resp. Br. 3 n.1)—it is clear that the court of appeals did not share respondents' conviction that the matter was moot. It explicitly rejected the factual contention that the union itself had declared the 1980 election "null and void" (Resp. Br. 15). Respondents believe that that was the inevitable effect of "stipulations" made by the union in proceedings held in the district court on January 9, 1981 (Resp. Br. 4-7 n.2). But the court of appeals understood the record differently, recognizing that the " 'stipulations' " were "offers of settlement to which appellants agreed to be bound, if appellees so agreed[,]" rather than "true factual stipulations narrowing the factual dispute" (Pet. App. 72a n.22). Because it understood the record in that way, the court considered and rejected on the merits the Secretary's argument "that the district court's TRO * * * was error" (*id.* at 47a, 61a-67a).

In fact, it appears that the district court itself concluded that the union's "stipulations" did not render the TRO issue moot. In the preliminary injunction

entered on July 13, 1981, the district court found it necessary to order that (Pet. App. 86a):

> The nominations received at the November 9, 1980 meeting of defendant local 82, and the election originally scheduled to be completed on December 13, 1980, are legally without effect pending further order of this court. The ballots from that election shall remain in the custody of an officer of this court.

Respondents make no more convincing showing that the second issue—the district court's order directing a rerun election—is moot. This claim rests as well on the "stipulations" that the court of appeals found not to be binding. Here too the court of appeals addressed and rejected on the merits the union's and the Secretary's objections to this relief (Pet. App. 46a-61a).

The district court likewise saw no mootness problem lurking about this issue: the preliminary injunction directed that the union must conduct a new nominations meeting and mail ballot election within 80 days (Pet. App. 86a). And in its opinion the district court found "plainly without merit" the argument that the union's "stipulation that they will conduct a new nominations meeting and election * * * [rendered] plaintiffs' remaining Title I claims * * * moot" (Pet. App. 13a). The union's proposal was, after all, nothing more than the " 'voluntary cessation of allegedly illegal conduct' " (*ibid.*, quoting *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). See also *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).[1]

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[1] It is true that these observations are generally made in response to defendants' claims that a case is moot. But they

Respondents' claim concerning the third issue—that the union agreed to supervision of a new election by a third party appointed by the court (Resp. Br. 9 & n.4)—simply distorts the record. The "third party" to which the union's counsel referred was Joint Council 10 (J.A. 104). He went on to say that "it would be a gross misrepresentation * * * [to] conclude * * * that we were finding acceptable either the third party that Mr. Stern comes up with or the special master" (J.A. 111).

2. Respondents' second contention is that this case must be moot in its entirety once the officers chosen in 1981 complete their terms and the union's 1983 triennial election has occurred (Resp. Br. 28-34). (We are informed by petitioners that Local No. 82's 1983 election was completed on December 17, 1983, and that the new officers will be installed in January 1984.) This contention also is without merit.

In the first place, as petitioners note in their reply brief (Reply Br. 7-9), the preliminary injunction entered by the district court has continuing collateral consequences for the union and the individual petitioners and respondents. These include, according to petitioners, unresolved issues about the union's claim for the costs of the court-ordered election, respondents' application for attorneys' fees and their claim for damages, and salary claims of those who lost the court-ordered election but may—if the ballots impounded by the court are ever counted—turn out to have won the 1980 election.

Perhaps more important, however, respondents' contention ignores the continuing interest represented

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are hardly less pertinent where the claim of mootness is raised by a plaintiff, and the defendants themselves abjure any intent to do voluntarily what the court has directed.

by the Secretary in this litigation. In *Wirtz* v. *Local 153, Glass Bottle Blowers' Ass'n*, 389 U.S. 463 (1968), this Court held that the occurrence of a supervening election did not moot the Secretary's right to challenge an earlier election that he found violated Title IV of the Act, and to seek a new election conducted under his supervision. The court of appeals there had concluded "that it would serve 'no practical purpose' to void an old election once the terms of office conferred have been terminated by a new election." 389 U.S. at 475. This Court rejected that conclusion for two reasons (*ibid.*):

> First, it fails to consider the incumbents' possible influence on the new election. Second, it seems to view the Act as designed merely to protect the right of a union member to run for a particular office in a particular election. But the Act is not so limited, for Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.

See also *Wirtz* v. *Local No. 125, Laborers' Union*, 389 U.S. 477 (1968) (same); *NLRB* v. *Raytheon Co.*, 398 U.S. 25 (1970) (Board's right to seek enforcement of cease and desist order not mooted by occurrence of two supervening representation elections).

In this case respondents claim that the occurrence of a supervening election moots the Secretary's challenge to the district court's order directing an earlier election, contrary to Title IV. But as *Bottler Blowers'* makes clear, the outcome of one election may affect the next, in part because of the advantages incumbents enjoy.[2] It could be argued that the election

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[2] Cf. *Carroll* v. *Princess Anne*, 393 U.S. 175, 178 (1968) (10-day TRO upheld by state court not moot since it "con-

conducted by the district court—though unauthorized by the Act—at least had some guarantee of correctness, and would not have affected the next election in the way the challenged election in *Bottle Blowers'* did. But we have no assurance that that is so. After all, the incumbents in the court-ordered 1981 election were the same individuals charged with violating the Act in 1980. And as Congress was aware when it passed the Act, "[a] court is * * * a clumsy instrument for supervising an election." *Labor-Management Reform Legislation: Hearings on S. 505 et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 133 (1959). Indeed, respondents themselves argued in the district court that one of the incumbents (who petitioners inform us was reelected in both 1981 and 1983) continued his violations notwithstanding the preliminary injunction.[3]

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tinues to play a substantial role in the response of officials to [petitioners'] activities"); *Nader* v. *Butz*, 474 F.2d 426, 428 (D.C. Cir. 1972) (challenge to 1971-1972 price supports not mooted by establishment of new supports for 1972-1973, since "the improprieties charged to the 1971-72 determination might also have tainted the 1972-73 determination").

[3] See respondents' Proposed Contempt Judgment and Order, lodged with our brief on the merits with the Clerk of this Court. The district court dismissed respondents' contempt motion on August 31, 1983 (Pet. Reply Br. 9 n.13).

Moreover, the district court acknowledged that it was without authority to correct violations of Title IV that may have occurred in connection with the 1980 election. One such violation asserted by respondents was that the union had imposed an unreasonable qualification on candidate eligibility (Pet. App. 7a-8a, 12a-13a). Because the court had no jurisdiction over this asserted Title IV violation, it was unable to do anything to correct it in the 1981 rerun (see Pet. App. 88a).

But the question of mootness need not, in any event, turn on proof that defects in the court-ordered election tainted the results of the 1983 balloting. For in its preliminary injunction the court also retained custody of the ballots from the 1980 election (Pet. App. 86a). That portion of the judgment still prevents the Secretary from fulfilling his statutory obligation to investigate complaints about the conduct of elections (29 U.S.C. 482(b)) and to protect the "vital public interest in assuring free and democratic union elections" (*Wirtz* v. *Local 153, Glass Bottle Blowers' Ass'n*, 389 U.S. at 475) by *himself* supervising the conduct of a new election in appropriate cases (29 U.S.C. 482(c)).[4]

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[4] Respondents mistakenly urge that it is now too late for the Secretary to fulfill that duty (Resp. Br. 30 n.14). But for purposes of the complaint procedure envisioned by the Act (29 U.S.C. 482(a)) the 1980 election has never been completed, since the ballots have not been opened and tabulated, and no results have been announced. There, is, moreover, a second reason why a complaint would still be timely. The pre-election protest procedures permitted by the union were interrupted because this action was filed (J.A. 120), and no final decision has been rendered there. It is still open to a complaining member to await exhaustion of those proceedings (see 29 U.S.C. 482(a)(1)), before filing with the Secretary.

For these reasons this case is plainly distinguishable from *Canez* v. *Guerrero*, 707 F.2d 443 (9th Cir. 1983), relied upon by respondents (Resp. Br. 34). In that case the election was completed, and Title IV complaints were filed and denied by the Secretary. 707 F.2d at 446 n.2.

If the Court should conclude, contrary to petitioners' and our submission, that this case is now moot, it should follow its established practice in dealing with civil cases from courts in the federal system that have become moot while pending this Court's decision on the merits, by vacating the judgment of the court of appeals and remanding the case with directions to dismiss the complaint as moot. See, *e.g.*, *Great Western*

3. Concerning the merits, respondents first assert that there is nothing improper about a court's enjoining the counting of ballots in a union officer election while it decides a claim that Title I of the Act has been violated (Resp. Br. 57-62). This is so, they argue, for three reasons. To begin with, Title I has no counterpart to the requirement in Title IV that "[t]he challenged election shall be presumed valid pending a final decision thereon" (29 U.S.C. 482(a)). Moreover, they contend, violations of Title I are more serious than the merely "technical requirement[s] of Title IV," so there is more reason to prevent wrongdoing incumbents from assuming office pendente lite (Resp. Br. 58-59). Finally, they argue that halting an election under Title I is more permissible because "[t]he process for remedying violations of Title IV is slow," while "Title I specifically provides for direct appeal to the Courts, for discretionary waiver of exhaustion requirements, and for issuance of injunctive relief" (Resp. Br. 60).

The first of these reasons—the difference in the specific language of Titles I and IV—is amply treated in our opening brief (Gov't Br. 27-35). We there point out that Title I relief *is* specifically limited to what is "appropriate" (29 U.S.C. 412), and that permitting courts to halt ongoing elections in cases where Titles I and IV overlap would inexcusably obliterate Title IV's explicit and detailed procedures for challenging elections.[5] We also note that Title I's

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Sugar Co. v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

[5] See, *e.g.*, 29 U.S.C. 482(a) (member must exhaust internal remedies before asking Secretary to overturn election; a challenged election is presumed valid pending a final decision), 482(b) (Secretary to sue only if he finds probable cause to believe an unremedied violation has occurred), 482(c)

use of the word "appropriate" (and its failure to state that challenged elections shall be presumed valid) is entirely in keeping with the fact that Title I protects a broad spectrum of rights, many of which have nothing to do with elections, others of which (though they apply to elections) are not limited to union *officer* elections (Resp. Br. 28).

Respondents' second reason—that those accused of Title I violations are somehow less worthy than those who may have violated Title IV, and so can more justifiably be prevented from assuming office—is frivolous. Far from being merely "technical" (Resp. Br. 58), Title IV's guarantees (an opportunity to nominate, the right to vote, to be a candidate, to support a candidate, to have one's vote counted equally, to have "[a]dequate safeguards to insure a fair election") are the very essence of union democracy. Congress directed that challenged elections be presumed valid not because it viewed infringement of those rights as mere peccadillos, but because it appreciated the difference between accusation and proof, and because it thought that "[t]he newly elected officers would be more likely to have the support of the members." Cox, *The Role of Law in Preserving Union Democracy*, 72 Harv. L. Rev. 609, 634 (1959). On the other hand, enjoining an ongoing election has the perverse effect of keeping in office the very incumbents most likely to have committed violations, despite the possibility that the enjoined election may have dislodged them from office.

Nor is there any support for the claim that disruption of the election process is tolerable because

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(court to order new election only if the violation may have affected the outcome), 483 (Title IV remedy "for challenging an election already conducted shall be exclusive"). See also 29 U.S.C. 481 (b) (local unions must hold elections every three years).

courts will afford more prompt relief under Title I than is available under Title IV. As an initial matter, the union's internal remedies (derailed by the filing of this action, J.A. 120) might have corrected the situation here in far less time than the full year consumed in the district court. And even where the complainant does have to seek the aid of the Secretary, respondents have not shown that the resulting delays in conducting a rerun are necessarily more severe than the year taken by the district court, since the Secretary is able to obtain voluntary compliance from the union in nearly half the cases in which he finds violations that must be remedied.*

4. Respondents argue in the alternative that courts must be able to act as the district court did here, because the Secretary cannot effectively protect Title I rights via the procedure specified in Title IV (Resp. Br. 64-71). That is so, they contend, for two reasons. First, the rights protected by Titles I and IV are not coextensive. Second, even if they were, relief is available under Title IV only where the violation may have affected the outcome of an election.

It is surely correct to say (as we in fact do in our opening brief (Gov't Br. 28-29)) that Title I protects rights not covered by Title IV. But the relevant ques-

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* Respondents cite statistics (Br. 75-76) purporting to show long delays in the implementation of Title IV remedies. But the figures cited cover only cases that are litigated, and thus do not present an accurate picture. For the 13-year period between 1965 and 1978, the Secretary obtained voluntary compliance without litigation in nearly 45% of the cases in which he found violations requiring a remedy. U.S. Dep't of Labor, *Compliance, Enforcement and Reporting in 1978 Under the Labor-Management Reporting and Disclosure Act* 4, Table 2 (1981). According to unpublished data from the Department of Labor, the comparable figure for the period from October 1, 1978, through September 30, 1982, was 42.8%.

tion is whether Title I protects any rights in union officer elections that are not covered by Title IV, and that can only be remedied by conducting a new election. It is difficult to imagine such a case, and respondents have suggested none. They do assert (Resp. Br. 67) that "Title IV would not protect * * * [a member's] rights 'to express at meetings of a labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting' " (see 29 U.S.C. 411(a)(2)). But Section 401(e) (29 U.S.C. 481(e)) (emphasis added) specifically guarantees members "a reasonable opportunity * * * for the nomination of candidates" and "the right to vote for *or otherwise support* the candidate or candidates of [their] choice * * *." Respondents also claim that Title IV affords no protection against a member's being " 'fined, suspended, expelled, or otherwise disciplined' in reprisal for exercising rights protected under Title I" (Resp. Br. 67). But, again, Section 401(e) specifically states that members shall have "the right to vote for or otherwise support * * * candidates * * * without being subject to penalty, discipline, or improper interference or reprisal of any kind * * *."[7]

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[7] Respondents mistakenly state that "[t]he two violations complained of and the subject of the instant appeal, and a third one not appealed are violations the Secretary has no power to redress under Title IV, as he recognizes in his regulations" (Resp. Br. 65). But the regulation cited (29 C.F.R. 452.7) says only that "*[d]irect* enforcement of Title I rights, *as such*, is limited to civil suit in a district court" (emphasis added). As to the violations in this case, respondents' claim is simply wrong. The violations currently at issue are the exclusion of Crowley and others from the nominations meeting (see Pet. App. 22a; J.A. 32) and the refusal to recognize the nomination of Lynch for the office of secretary-treasurer

Respondents' second point is no more convincing. They contend (Resp. Br. 68-71) that even where Titles I and IV overlap a district court must be able to enjoin an ongoing election and order a rerun to correct Title I violations, because Title IV permits the Secretary to act only where "the violation * * * may have affected the outcome" (29 U.S.C. 482(c)(2)). But it would be irrational to permit the kind of remedial overkill this argument envisions. If it cannot even be said that a violation "*may*" have affected the outcome of an election, it is surely not "appropriate" (29 U.S.C. 412) to subject the union and its members to the draconian measures respondents suggest. As we noted in our opening brief (Gov't Br. 44), nothing in the Act would prevent a Title I court in such cases from entertaining actions for damages, or even resorting to "equitable remedies that did not result in delay or judicial supervision of the election process." [8]

(*ibid.*). Both of those actions, if proved, would be contrary to the provision in Section 401(e) (29 U.S.C. 481(e)) of "a reasonable opportunity * * * for the nomination of candidates" and "the right to * * * support the candidate or candidates of [one's] choice." The refusal to recognize Lynch as a candidate also conflicts with the right of "every member in good standing [to] be eligible to be a candidate." The "third [violation] not appealed," to which respondents refer (Resp. Br. 65), apparently is the disciplinary action taken against Robert Lunnin, who nominated Lynch and the next day challenged the nominating process internally (J.A. 30; but see Pet. App. 20a). As the district court noted, Teamsters Joint Council 10 overturned the disciplinary sanctions imposed on Lunnin (Pet. App. 6a).

[8] Respondents err, however, in saying that "the only part of the election the Secretary could or would have ordered rerun under Title IV was Griffith's running unopposed for the Secretary-Treasurer position" (Resp. Br. 70). Nor is the test under Section 402(c)(2) (29 U.S.C. 482(c)(2)) simply

5. Respondents' final point worthy of mention is that even if the Secretary can protect Title I rights violated during an officer election, there is no reason to believe that he can do better under Title IV than a court can in a Title I suit (Resp. Br. 74-80). But respondents do nothing to undercut the various reasons offered in our opening brief (Gov't Br. 35-45) for believing precisely that. Much less do they explain why the scheme carefully crafted by Congress for challenging union elections (see Gov't Br. 28-32) should be ignored.

Respondents suggest, for example (Resp. Br. 74-77), that courts can conduct new elections more speedily under Title I than the Secretary can under Title IV. There is little merit to this, as we have already shown. See pages 9-10 & note 6, *supra*. In addition, this suggestion ignores the more significant delay in this case—not in conducting the rerun, but in the occurrence of the regularly scheduled 1980 election. Although 29 U.S.C. 481(b) requires local unions to elect officers every three years, the district court held up the 1980 triennial election for an entire

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"mathematical" in the way respondents and the court of appeals (Pet. App. 65a) envision. A numerical calculation is made only where appropriate, such as where the votes of certain members are challenged. See, *e.g.*, *Marshall* v. *American Postal Workers Union*, 486 F. Supp. 79, 82 (D.D.C. 1980). And exclusion of members from a nominations meeting is considered sufficient by itself to affect the outcome for all offices for which there were to be nominations. See *Wirtz* v. *Local Union No. 1622*, 285 F. Supp. 455, 463-464 (N.D. Cal. 1968); *Marshall* v. *Office & Professional Employees*, 107 L.R.R.M. 2456, 2458 (D.D.C. 1981); *Usery* v. *Local Union No. 20, Sheet Metal Workers*, 105 L.R.R.M. 3203, 3205 (D.N.J. 1980).

year. That could not happen under Title IV. 29 U.S.C. 482(a).

The claim that union autonomy was respected here, just as it would have been under Title IV, is even more insubstantial (Resp. Br. 77-79). It may or may not be true that the union was willing to comply with the district court's orders. See pages 2-4, *supra*. But autonomy is respected not by securing consent to a court's wishes, but by permitting the union to clean its own house. See 29 U.S.C. 482(a); *Wirtz* v. *Local 153, Glass Bottle Blowers' Ass'n*, 389 U.S. at 472-473 (quoting S. Rep. 187, 86th Cong., 1st Sess. 21 (1959)). And failing that, Congress sought "to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

We also argue in our opening brief (Gov't Br. 38) that the Secretary performs a useful function in screening frivolous complaints. Respondents claim, on the other hand, that courts are actually more adept at dealing with election, due process, and free speech claims—matters frequently litigated in other contexts (Resp. Br. 79). It is true that courts often address constitutional issues quite similar to Title I questions. They also deal with constitutional issues that are like Title IV questions. Compare *Clements* v. *Fashing*, 457 U.S. 957 (1982) (right to be a candidate); *Ball* v. *James*, 451 U.S. 355 (1981) (right to have votes counted equally), with 29 U.S.C. 481(e). But the screening role played by the Secretary consists not so much in resolving refined legal issues as in investigating and determining on the facts whether there is "probable cause to believe that a violation * * * has occurred" (29 U.S.C. 482(b)).

That investigatory role is not one courts are equipped to play.[9]

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded with instructions to vacate the preliminary injunction and return the ballots to the custody of petitioners.

Respectfully submitted.

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[9] Respondents' assertions that courts can supervise rerun elections as competently as the Secretary (Resp. Br. 80-82), and can consolidate numerous election-related claims in one action (*id.* at 83-84), are adequately addressed in our opening brief (Gov't Br. 17, 30, 34-35, 39, 41).

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